

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

NO.
79-546

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION
OF HOLLYWOOD,

Appellant,

V.

CHEMICAL REALTY CORPORATION,

Appellee.

MOTION TO DISMISS APPEAL OF APPELLANT
FROM THE ORDER OF THE SUPREME COURT OF
NORTH CAROLINA DISMISSING APPELLANT'S
APPEAL AND DENYING ITS PETITION FOR
DISCRETIONARY REVIEW, AND, IN THE
ALTERNATIVE, MOTION TO AFFIRM THE JUDGMENT
OF THE TRIAL COURT, THE COURT OF APPEALS
OF NORTH CAROLINA AND THE SUPREME COURT
OF NORTH CAROLINA AND BRIEF IN SUPPORT OF
SUCH MOTION.

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MOTION TO DISMISS AND, IN THE ALTERNATIVE,
MOTION TO AFFIRM JUDGMENT

The plaintiff-appellee, Chemical Realty Corporation, hereby moves, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, to dismiss the appeal of the defendant-appellant, Home Federal Savings And Loan Association of Hollywood, from the judgment of the Supreme Court of North Carolina dismissing appellant's appeal and denying its petition for discretionary review. Appellee moves to dismiss the appeal on the ground that it does not present a substantial federal question, in that (a) the undisputed facts of the case clearly establish that the Superior Court of Buncombe County, North Carolina, has jurisdiction over the person of the appellant, and (b) the law which supports the decisions of all three of the North Carolina courts who considered this matter is clear and unequivocal.

In the alternative, the appellee moves the Court, pursuant to Rule 16(1)(d), to affirm the judgment of the trial court, the Court of Appeals of North Carolina, and the North Carolina Supreme Court in this action, on the ground that the questions on which the decision of this cause depends are so unsubstantial as to require no further argument, in that (a) the undisputed facts of the case clearly establish that the Superior Court of Buncombe County, North Carolina has jurisdiction over the person of the appellant, and (b) the law which supports the decision of the North Carolina courts is clear and unequivocal.

In support of this Motion, Appellee submits the following Brief.

B R I E F

Plaintiff-appellee has moved to dismiss defendant-appellant's appeal in this action on the ground that the questions presented by Appellant's appeal do not present a substantial federal question. The North Carolina Supreme Court has already dismissed Appellant's appeal to that court for that reason. The detailed findings of fact and conclusions of law of the trial court, affirmed by the North Carolina Court of Appeals, and reviewed by the North Carolina Supreme Court, clearly establish a constitutional exercise of jurisdiction over Appellant by the courts of North Carolina.

QUESTIONS PRESENTED

1. Were the North Carolina courts correct in holding that the Appellant is subject to the jurisdiction of the courts of North Carolina and that the assertion of such jurisdiction does not violate the Fourteenth Amendment of the United States Constitution, where the action is based upon a contract made and to be performed in North Carolina and where the Appellant purposefully invoked the benefits and protection of the laws of North Carolina?

2. Is GS §55-145(a)(1) clear and consistent with the corporate law of North Carolina such that its application to the Appellant complies with the

"fairness" doctrine of due process under the Fourteenth Amendment.

STATEMENT OF THE CASE

This action was commenced on December 20, 1976, by the plaintiff-appellee, Chemical Realty Corporation (hereinafter referred to as "Chemical" or "Appellee"), against the defendant-appellant, Home Federal Savings & Loan Association of Hollywood (hereinafter referred to as "Home Federal" or "Appellant"), in the Superior Court of Buncombe County, North Carolina. The action is based upon an alleged breach of contract by Home Federal (the Permanent Lender) to purchase a note and take an assignment of a deed of trust from Chemical (the Construction Lender) arising out of the construction of a hotel in Asheville, North Carolina, by a North Carolina corporation which borrowed the construction loan proceeds from Chemical.

On January 18, 1977, Home Federal filed a motion to dismiss the complaint on the ground, among others, that the North Carolina court lacked jurisdiction over the person of the defendant.

A hearing was held on August 26, 1977, before The Honorable Harry C. Martin, Senior Resident Superior Court Judge in Buncombe County (now Judge of the Court of Appeals of North Carolina), on Home Federal's motion to dismiss.

Subsequent to the hearing, after consideration of the pleadings, the affidavits of the parties and other witnesses, the depositions of the parties and witnesses, and briefs filed with the court, the court informed the parties that it had decided to deny Home Federal's motion. Home Federal specifically requested that the court make findings of fact and conclusions of law.

On October 1, 1977, Judge Martin entered his findings of fact, conclusions of law and order, denying Home Federal's motion to dismiss. The opinion of the trial court is extremely instructive, because of the detailed findings of fact and conclusions of law relating to jurisdiction over Home Federal. Consequently, a copy of that opinion is attached hereto as Exhibit A.

Home Federal appealed from the Order of October 1, 1977 to the North Carolina Court of Appeals. The appeal was argued in the Court of Appeals on February 26, 1979. On April 17, 1979, the Court of Appeals unanimously affirmed the Order of the trial court.

On May 21, 1979, Home Federal appealed to the Supreme Court of North Carolina from the Order of the Court of Appeals and, in the alternative, petitioned for discretionary review of that Order.

Chemical moved to dismiss the appeal on the ground that the appeal did not raise a substantial constitutional question, in that the undisputed facts and the law clearly supported the decisions of the trial court and the Court of Appeals.

On July 5, 1979, the Supreme Court of North Carolina granted Appellee's Motion and dismissed the Appeal and denied Home Federal's Petition for Discretionary Review. (The copy of the judgment of the Supreme Court of North Carolina attached to appellant's Jurisdictional Statement as Appendix A is incorrect, in that it leaves out the twelfth line of the judgment, dismissing the appeal and denying appellant's petition for discretionary review. For that reason, a copy of the judgment of the North Carolina Supreme Court is attached hereto as Exhibit B.)

The appellant filed its appeal with this court on October 2, 1979. A copy of appellant's jurisdictional statement was received by the appellee's attorneys on October 4, 1979.

SUMMARY OF ARGUMENT

1. GS §55-145(a)(1) provides that the courts of North Carolina have jurisdiction over a foreign corporation in an action arising out of a contract made or to be performed in North Carolina.

2. Chemical alleges that Home Federal is liable to it as a result of a breach of two contracts, a permanent commitment (of which Chemical was the third party

beneficiary), and a letter agreement between Chemical and Home Federal.

3. The facts found by the trial court and left unchallenged by the appellate courts clearly establish that one or both of the contracts sued upon by Chemical were made in North Carolina.

4. Both contracts call for substantial performance by the parties in North Carolina, including the construction of the hotel (which was the subject of the contracts) in North Carolina, the lending by Chemical of the money necessary to construct the hotel in North Carolina, the filing of a deed of trust and financing statements in North Carolina and monthly inspections of the project in North Carolina by Chemical's engineer.

5. The assertion of jurisdiction under GS §55-145(a)(1) does not violate the due process "minimum-contacts" requirement of the Fourteenth Amendment to the United States Constitution. The contracts were made and to be performed in North Carolina. The terms of the permanent commitment were negotiated in North Carolina by the president of Home Federal, employees of Home Federal visited North Carolina on several occasions in connection with the project and Home Federal required Chemical to attach Home Federal's deed of trust to Chemical's deed of trust at the time it was filed with the Register of Deeds of Buncombe County, North Carolina. Furthermore, Home Federal was admittedly engaged in a

"nation-wide lending program" pursuant to which it discussed numerous North Carolina projects with a North Carolina mortgage brokerage company, entered into a loan transaction with another North Carolina resident at about the same time as the transaction in the instant case, and is still participating in that other transaction. Home Federal also entered into a servicing agreement with a North Carolina mortgage brokerage company to service this loan and its other North Carolina loans.

6. The North Carolina Court of Appeals has held, in a case substantially identical to the instant case, that the permanent lender is subject to jurisdiction in North Carolina pursuant to GS §55-145(a) (1).

7. Home Federal is also subject to jurisdiction under a number of other North Carolina long-arm statutes, in that (a) Appellant has breached a contract to acquire an interest in real estate in North Carolina; (b) Appellant solicited this loan transaction at a time when it was soliciting other loan transactions in North Carolina; and (c) Appellant is engaged in substantial activity in this state.

8. The "minimum contacts" cases cited by Home Federal are not pertinent to this action.

9. GS §55-145(a) (1) is not ambiguous or contradictory and thus is not "unfair" in its application to Home Federal. GS §55-131(b) (6), which is

alleged to be contradictory to GS §55-145 (a)(1), simply provides that a foreign corporation shall not be considered to be transacting business in this state for the purpose of the Business Corporation Act by reason of making or investing in loans through independent agencies within this state. The primary purpose of GS 55-131(b)(6) is to exempt foreign corporations under certain circumstances from the requirement of obtaining a certificate of authority to do business in North Carolina. GS §55-145(a)(1) by its terms applies to corporations not transacting business in this state. Moreover, the numerous other long-arm statutes which support jurisdiction over Home Federal in this case are not contained in the Business Corporation Act.

STATEMENT OF FACTS

It is essentially a factual question as to whether the North Carolina long-arm statutes apply to establish jurisdiction over Home Federal, and to determine whether the assertion of jurisdiction complies with the due process requirements of the Fourteenth Amendment. The facts in this case, found by the trial court and affirmed by the North Carolina Court of Appeals, clearly establish that North Carolina has jurisdiction over Home Federal and that the assertion of jurisdiction does not violate the due process requirements.

This Court has held that it will not disturb the findings of fact of a state court unless there is evidence of a

"palpable evasion" of the defendant's constitutional rights. See Milk Wagon Drivers' Union of Chicago vs. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S. Ct. 552 (1941), stating that:

"It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and its interpretation was in Illinois courts and not here. To substitute our judgment for that of the State Court is to transcend the limits of our authority." Milk Wagon at p. 55.

And see Norton Co. vs. Department of Revenue of State of Illinois, 340 U.S. 534, 71 Sup. Ct. 377 (1951), holding that this court may examine the records to determine whether constitutional rights have been invaded, but "that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." Norton at p. 380.

In fact, after the trial court entered its order in the instant case, Home Federal stipulated to most of the facts found by that court.

In summary, the essential facts of this case are as follows:

1. In the early spring of 1972, Asheville Development Associates, a North Carolina partnership composed of Earl Crawford and others, proposed to build a hotel in downtown Asheville, North Carolina. Crawford planned to obtain a short-term loan to construct the hotel. The construction lender would be paid off by a "permanent lender" who would then take a first deed of trust against the completed hotel and who, in turn, would be paid by Crawford's group over a long term.
2. Atlantic Mortgage and Investment Company in Winston-Salem, North Carolina, a mortgage brokerage company, put Crawford in touch with Home Federal.
3. Crawford met with Thomas Wohl, the president of Home Federal, and with employees of Atlantic, in Asheville. At the meeting, Wohl inspected the proposed hotel site and then proceeded to negotiate with Crawford the terms of the permanent loan. All of the essential terms of the permanent loan were decided upon at the meeting in Asheville, e.g., the principal amount, the interest rate, the term, the commitment fees, the length of the commitment, and the security for the loan.

4. When Wohl returned to Florida, he prepared the permanent commitment letter, dated April 14, 1972, and delivered it to Atlantic for forwarding to Crawford and for acceptance by him.

5. Atlantic forwarded the commitment to Earl Crawford in Asheville for his acceptance and execution. Crawford accepted the offer of Home Federal in Asheville and delivered an executed copy of the commitment letter, together with the \$60,000 commitment fee, to Atlantic in Asheville. Atlantic then mailed the acceptance and fee to Home Federal from Winston-Salem, North Carolina.

6. In the summer of 1972, Home Federal objected to the management company proposed for the hotel. In October, 1972, Wohl met with Crawford, Atlantic, and Motor Inn Management Company (the proposed substitute company). That meeting took place in Charlotte, North Carolina. Subsequent to the meeting, Home Federal accepted Motor Inn Management Company as the substitute company.

7. In late November, 1972, Chemical was approached by a New York brokerage firm to become the construction lender for the project. Chemical met with Crawford and Atlantic, and was informed that Home Federal had made the permanent commitment and that Home Federal would "take out" the construction loan. In reliance upon the permanent commitment from Home Federal, Chemical issued a construction loan commitment on December 18, 1972.

8. Chemical then began to negotiate an agreement with Home Federal in order to make certain of the circumstances under which Chemical would be paid by Home Federal. Those negotiations were handled through Atlantic, acting as Home Federal's agent in the transaction.

9. On or about the first of April, 1973, Chemical and Home Federal reached a final agreement through telephone conversations with Atlantic. The terms of that agreement were reduced to writing in a letter prepared by Atlantic in Winston-Salem. The letter was delivered personally by Atlantic to Home Federal, was executed by Home Federal, and then was delivered personally by Atlantic to Chemical in New York. (Such agreement is hereinafter referred to as the "Letter Agreement". A copy of the Letter Agreement is attached hereto as Exhibit C. The Exhibits to the Letter Agreement are omitted because they constitute more than 30 additional pages.)

10. Relying on a permanent commitment and the Letter Agreement, Chemical closed the construction loan on April 13, 1973. Subsequently, Chemical forwarded to Home Federal an additional \$90,000 in commitment fees in order to extend the commitment through October 14, 1974. Chemical then recorded the deed of trust (with Home Federal's deed of trust attached thereto) with the Register of Deeds of Buncombe County, and filed the financing statement with the Buncombe County Register of Deeds and the Secretary of State of North Carolina.

11. Home Federal hired a North Carolina attorney to certify that it would have a first lien on the hotel upon purchase of the note and deed of trust from Chemical.

12. Landmark Hotel, Inc. (the successor to Asheville Development Associates) began construction of the hotel. Chemical made monthly advances to Landmark for construction in a total amount of approximately \$4,500,000. Each advance was certified by Chemical's engineer, Merritt & Harris, after an inspection of the hotel in Asheville.

13. In October, 1973, Home Federal entered into a servicing agreement with Atlantic, pursuant to which Atlantic was to service this loan and other loans for Home Federal. Payments on the Home Federal loans were to be made to Atlantic in North Carolina, and then forwarded to Home Federal by Atlantic after the servicing fee had been deducted.

14. During the course of construction, Landmark, Atlantic, and Chemical communicated with Home Federal about the status of construction and other matters relating to the hotel.

15. Home Federal's officers visited the construction site on a number of occasions to inspect the progress of construction.

16. The hotel opened for business in July, 1974, although construction was still being completed on some floors of the hotel.

17. In late September, 1974, the Asheville Housing Authority issued a certificate of occupancy for the hotel, and Chemical's engineers (as required by the Letter Agreement) certified that the hotel was completed in substantial compliance with the plans and specifications.

18. In late September, 1974, Crawford informed Atlantic and Home Federal that the terms of the permanent commitment had been met and that Crawford and Chemical were ready to close the permanent loan. Crawford requested that the closing take place in Asheville. Crawford received no response to that request.

19. The hotel shut down operations on October 9, 1974.

20. Chemical then informed Home Federal that it would close the permanent loan with Home Federal at Home Federal's office. (It did not appear that Home Federal was willing to attend the closing elsewhere at that point.) Chemical met with Tom Wohl and his attorney in Hollywood for the purpose of closing the permanent loan. Chemical took to its meeting with Home Federal the assignment of the deed of trust and an assignment of the financing statements, among other things. Home Federal refused to close the permanent loan because the hotel was closed. When it became evident that Mr. Wohl would not close the permanent loan at that time, Chemical's representatives requested an extension of the loan commitment, which Home Federal refused.

21. Substantially all of the requirements of the permanent commitment and Letter Agreement were to be performed in North Carolina:

a. An appraisal of the hotel project in Asheville was to be obtained.

b. The hotel was to be constructed in Asheville in accordance with certain plans and specifications.

c. The plans and specifications had been prepared by a North Carolina architect.

d. The hotel was to be furnished and equipped in accordance with certain requirements.

e. A management contract was to be entered into (and approved by Home Federal) between Landmark and the management company. The management contract was eventually entered into with Motor Inn Management, a North Carolina firm. Under the Motor Inn Management contract, Home Federal had the right to require Motor Inn Management to perform in the event a foreclosure occurred.

f. Home Federal was to receive a first lien deed of trust against the hotel property in Asheville, which deed of trust would have to be filed with the Register of Deeds of Buncombe County in order to perfect such a first lien.

g. Substantial commitment fees were to be paid in North Carolina by the borrower and were in fact paid in North Carolina, both with respect to the original

fees and the fees paid for the extension of the commitment at the time of the construction loan closing.

h. Approval of the hotel was to be obtained from various local governmental authorities.

i. Property taxes were to be escrowed by Atlantic (Home Federal's servicing agent).

j. The note to Home Federal was to be endorsed by the principals of Landmark, who were North Carolina residents.

k. To these facts may be added the significant consideration that the loan was negotiated and agreed upon in North Carolina in the early spring of 1972.

22. Landmark, in conjunction with Chemical, performed the various terms of the permanent commitment and Letter Agreement described above.

23. Home Federal also took part in the performance of a number of activities which occurred in North Carolina:

a. It agreed to purchase the note and take an assignment of the deed of trust from Chemical and thereby become the secured creditor of a North Carolina borrower.

b. It visited North Carolina on at least four occasions to negotiate the transaction and to inspect the property and the operation of the hotel.

c. It rejected the original management company and required the substitution of Motor Inn Management as the new management company, after interviewing Motor Inn Management in Charlotte.

d. It approved the preliminary plans and specifications.

e. It later approved the working plans and specifications prepared by the North Carolina architect when plans were finally adopted.

f. It approved the survey of the property.

g. It hired an attorney in Winston-Salem, North Carolina to certify that the construction and permanent loan notes and deeds of trust would place Home Federal in the position of the holder of a first deed of trust against the hotel upon assignment of the deed of trust to Home Federal.

h. It used Atlantic as its intermediary or agent throughout the transaction, including executing an agreement to engage Atlantic as servicing agent upon the closing of a permanent loan.

24. In addition, a number of very important actions of Chemical were to take place and did take place in North Carolina:

a. Chemical was to make advances under the construction loan to the North Carolina borrower and, from time to time, to various North Carolina

contractors, for the purpose of constructing the hotel in Asheville. In fact, Chemical did advance almost \$4,500,000 for the construction of the hotel. The advances were delivered to Landmark in the form of checks made payable to the various contractors and suppliers.

b. Chemical's engineer, Merritt and Harris, Inc., visited the project at least monthly and prepared monthly inspection reports on the project. As required by the Letter Agreement, Merritt and Harris also certified, after inspection, that the hotel was in substantial compliance with the plans and specifications.

c. Home Federal's commitment fee was to be paid to it by Chemical. Chemical wired the first \$30,000 directly to Home Federal's bank in Hollywood, Florida. Chemical delivered a subsequent fee to Atlantic, and Atlantic forwarded the fee to Home Federal.

d. Chemical was to obtain a first deed of trust against the hotel and a lien against the personal property, by making all of the proper filings in Buncombe County and with the Secretary of State of North Carolina. The deed of trust filed by Chemical in Buncombe County had Home Federal's deed of trust attached to it. At the time of the assignment by Chemical to Home Federal, the Home Federal deed of trust would become effective.

e. Chemical's employees visited the site on a number of occasions to check on the progress of the work and to help resolve problems.

In addition to the above described factors, substantially all of the material witnesses to the performance of the permanent commitment and Letter Agreement are in North Carolina, including:

Gene Whittington (supervising architect)
Dan Turner (president of D. C. Turner Construction Company, the general contractor)
Graham Armstrong (president of the furniture and fixtures contractor)
Earl Crawford (president of the borrower)
Motor Inn Management, Inc.
Asheville Housing Authority
Asheville building inspectors
Thomas Wharton, Mickey Burroughs, and
J. P. Lauffer (employees of Atlantic)

Finally, Home Federal was engaged during the time in question in various other activities in this state, including consummating a \$2,500,000 loan to a Jacksonville, North Carolina resident, secured by property in North Carolina. Home Federal's employees visited the site of that property in North Carolina, had an appraisal performed, and closed the loan in North Carolina. That loan is currently being serviced by Atlantic pursuant to the servicing agreement described above.

ARGUMENT

I. The North Carolina courts have jurisdiction over the person of the Appellant, and the assertion of jurisdiction over the Appellant does not violate the due process requirements of the Fourteenth Amendment.

In paragraph I (page 20) of its jurisdictional statement, Appellant contends that the assertion of jurisdiction over the Appellant by the North Carolina courts violates the due process clause of the Fourteenth Amendment, on the ground that the defendant does not have sufficient minimum contacts with this state in this case. In paragraph III (page 42) of Appellant's jurisdictional statement, Appellant contends that none of the North Carolina long-arm statutes apply to permit jurisdiction over the Appellant in this case. The North Carolina cases discussing the relevant long-arm statutes invariably discuss both the application of the statute and the due process issue. Consequently, Appellee will discuss both of these issues together.

The statement of facts set forth above clearly establishes that the Appellant has the necessary minimum contacts with North Carolina in this case. In addition, the decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court clearly establish that the Appellant is subject to the jurisdiction of the Superior Court of Buncombe County, North Carolina and that such jurisdiction is well within

the parameters of the due process requirements.

The North Carolina Court of Appeals in this case has held that the Appellant is subject to the jurisdiction of the North Carolina courts under GS §55-145 (a)(1), discussed *infra*, on the ground that this action arises out of a contract made and to be performed in North Carolina. The trial court found that the Appellant was subject to jurisdiction under a number of other North Carolina long-arm statutes.

It is well established that this court will not review questions of state law, its only authority being to review federal questions. See State of Missouri vs. Public Service Commission of Missouri, 273 U.S. 126, 47 S. Ct. 311 (1927). Consequently, the decision of the state courts in this case concerning the applicability of North Carolina long-arm statutes to this Appellant are final and not subject to review. Nevertheless, Appellee will discuss the applicability of the various North Carolina statutes briefly, in order to respond to the contentions of the Appellant. In addition, the commentary of the North Carolina courts concerning the due process requirement differs with the particular long-arm statute being considered in the particular case. Consequently, the relevant due process decisions of the North Carolina court will be discussed in the context of each applicable long-arm statute.

A. The Appellant is subject to jurisdiction under G.S. §55-145(a)(1), since this action arises out of a contract made and to be performed in North Carolina. Chemical's action is based on two contracts entered into by Home Federal, the permanent commitment (of which Chemical is clearly the third-party beneficiary) and the Letter Agreement between Home Federal and Chemical. Either of those contracts is sufficient to give the court jurisdiction, and the combination of them assures it. G.S. §55-145(a)(1) states that:

"Every foreign corporation shall be subject to suit in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

(1) out of any contracts made in this state or to be performed in this state..."

(1) Both contracts were made in this state. In order for a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done in this state. In Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E. 2d 15 (1970), the North Carolina Court of Appeals held that a contract was made in North Carolina within the meaning of G.S. §55-145(a)(1), where the defendant

foreign corporation sent a letter agreement to the plaintiff which was to be signed and returned by plaintiff to the defendant. The plaintiff signed his approval of the letter in North Carolina and mailed it back to the defendant. The letter from the defendant stated: "If the above is agreeable, please sign and return the original copy of this letter." In reaching its conclusion, the court summarized the general law in North Carolina:

"For a contract to be made in North Carolina, it must be executed in North Carolina, that is, the final act necessary to make it a binding obligation must be done in the forum state... The final act in the present case which was necessary to make the agreement a binding obligation and therefore, a contract, was the depositing of the letter containing the signature of (the plaintiff) in the mail." Goldman at pages 407 through 408.

The court also held that the assertion of jurisdiction under GS §55-145(a)(1) over a foreign corporation based simply on the making of a contract in North Carolina did not violate the due process requirements of The United States Constitution:

"...Our Supreme Court believes that a single contract, where it is made or to be performed, in North Carolina, is sufficient

to subject the non-resident corporation to suit in North Carolina under G.S. §55-145 (a) (1).

* * * * *

G.S. §55-145(a) (1) confers jurisdiction upon our courts when the contract is made or to be performed in North Carolina; therefore, where it is found that the contract was made in North Carolina or was to be performed in North Carolina, a sufficiently substantial contact to confer jurisdiction on the North Carolina courts has been established." (emphasis added) Goldman at page 406.

In affirming the Court of Appeals (Goldman v. Parkland, 277 N.C. 223, 176 S.E. 2d 784 [1970]), the North Carolina Supreme Court stated the North Carolina law that G.S. §55-145 was intended to give the North Carolina courts "the power to assert jurisdiction over nonresident defendants to the full extent permitted by the due process requirement." Goldman, *supra*, 227 N.C. at 230. See also, to the same effect, Byham v. The National Cibo House Corporation, 265 N.C. 50, 143 S.E. 2d 225 (1965).

Chemical contends that it is entitled to recover from Home Federal for breach of Home Federal's obligations under the commitment letter, of which Chemical was

the third party beneficiary. The original commitment letter states specifically that: "For your convenience, I am enclosing a copy of this letter for your acceptance." (emphasis added) Upon receipt of the original commitment letter, Atlantic immediately forwarded the letter to Earl Crawford for his acceptance. Mr. Crawford executed the acceptance in Asheville and delivered it in Asheville to Atlantic (together with the \$60,000 commitment fee). Atlantic then mailed the acceptance from Winston-Salem, North Carolina to Home Federal. Clearly the contract was made in North Carolina since the final act of acceptance took place in North Carolina.

Furthermore, all of the material terms of the original commitment were agreed upon by Landmark and Home Federal at the meeting in Asheville in the early spring of 1972.

Home Federal contends that the acceptance by Crawford was contingent upon Home Federal's agreeing to certain other conditions. It refers to the cover letter which was delivered to Atlantic along with the accepted commitment letter and the \$60,000 fee. That cover letter requests that certain items be "added to" the commitment and states that Crawford would be glad to meet with Home Federal to discuss the request. There is no indication that the additional requests are conditions to Crawford's acceptance. In fact, the first sentence of the cover letter specifically states that the commitment is enclosed "accepted by me on behalf of Asheville Development Association."

Furthermore, Michael Burroughs, the employee of Atlantic who received the signed commitment from Crawford in Asheville, stated in his affidavit that he was present when the cover letter was prepared and that Crawford and his attorney specifically stated that the commitment was accepted, whether or not Home Federal subsequently agreed to the three additional requests.

With respect to the Letter Agreement between Chemical and Home Federal, the terms were agreed upon by both parties through conversations and correspondence with Tom Wharton whose office was in Winston-Salem, North Carolina. When final agreement had been reached, Wharton reduced the agreement to writing in Winston-Salem for the formality of execution by Home Federal. Consequently, that contract was also effectually made in North Carolina at the time that final agreement to all terms was communicated to Wharton in Winston-Salem.

In any event, based on many of the above described factors, the North Carolina Court of Appeals found that the permanent commitment was made in this state. That is a question of state law, which should not be considered by this Court.

(2) The contracts were substantially to be performed in North Carolina. G.S. §55-145(a)(1) states that jurisdiction will be granted if the cause of action arises out of a contract to be performed in this state. Under the leading North Carolina cases it is clear that the contracts out of which this cause of action arose were to be

performed in North Carolina within the meaning of G.S. §55-145(a)(1).

In Equity Associates v. The Society For Saving, 31 N.C. App. 182, 228 S.E. 2d 761 (1976), pet. for dis. rev. den., 291 N.C. 711, 232 S.E. 2d 203 (1977), a case virtually on all fours with this case, the Court of Appeals held that a foreign corporation was subject to the jurisdiction of the North Carolina courts in an action based on the alleged breach of a permanent commitment by the defendant. The plaintiff was a North Carolina partnership which had obtained a permanent commitment from the defendant (a Connecticut corporation). The plaintiff was to build a motel in North Carolina by use of construction loan funds obtained from a Massachusetts Trust. Upon the completion of the construction of the motel, the permanent commitment (to which the construction lender was a party) provided that the defendant would purchase the note from the construction lender. Upon the completion of construction, the construction lender and the plaintiff went to the offices of the defendant in Connecticut in order to close the sale of the note, but the defendant refused to honor the commitment. In response to the plaintiff's complaint, the defendant alleged that the North Carolina courts had no jurisdiction over the defendant. The defendant filed affidavits stating that it had never resided in North Carolina, had not been admitted to do business in North Carolina, that it had no agent or place of business or property in North Carolina, and that it never solicited business in this state. The defendant did admit that

its employees had visited North Carolina twice on business relating to the contract in question.

The North Carolina Court of Appeals found that it had jurisdiction over the defendant pursuant to G.S. §55-145(a)(1). The court decided that the contract had been made in North Carolina because the plaintiff was the last party to sign the commitment agreement. The court also decided that the contract was to be performed substantially in North Carolina because the motel was to be constructed in North Carolina. Equity, supra, 31 N.C. App. at page 184.

The defendant apparently contended that G.S. §55-145(a)(1) applied only to causes of action "arising" in North Carolina and that the cause of action in that case arose in Connecticut because the alleged breach had occurred there. For this argument, defendant relied on Marshville Rendering Corporation v. Gas Heat Engineer Corporation, 10 N.C. App. 39, 177 S.E. 2d 901 (1970) and R.R. v. Hunt & Sons, Inc. 260 N.C. 717, 133 S.E. 2d 644 (1963). Home Federal apparently makes this same contention in alleging that the North Carolina courts have no jurisdiction because Home Federal refused to accept the assignment of the Note and Deed of Trust in Florida. (There is no evidence that the final closing was to take place in Florida. In fact, the evidence indicates that Home Federal was requested to come to Asheville to close, and Home Federal ignored the request, forcing Chemical to come to Florida.)

The Court of Appeals specifically held that the cause of action did not have to arise in North Carolina as long as the action involved a contract that had a substantial connection with this state. The court found that the Marshville and Hunt cases were not applicable, because they were limited to a tort action. Further, the statement in Hunt was simply dicta.

The court also held that assertion of jurisdiction in that case did not violate due process requirements of the United States Constitution, because the action of the defendant met the minimal contacts requirement "such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice." (Citing International Shoe Co. v. Washington, 326 US 310, 66 S. Ct. 154 [1945].) Equity, supra, 31 N.C. App. at 186. The court concluded that:

"It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws....Savings has performed just such a purposeful act. It has voluntarily joined in a contract to be performed here in North Carolina. It is sufficient for the purpose of due process if the suit is based on a contract which has a substantial connection with the

forum state." (Emphasis added.)
Equity, supra, 31 N.C. App.
186.

The court also noted that it was reasonable to require the defendant to defend the action in North Carolina because the motel was in North Carolina and facts about its construction and condition would probably be at issue in the action.

The North Carolina Court of Appeals has also held that a contract to lend money to a North Carolina resident is a contract to be performed in this state. In First Citizens Bank & Trust Company v. McDaniel, 18 N.C. App. 644, 197 S.E. 2d 556 (1973), the Court of Appeals held that a foreign guarantor of a note executed by a North Carolina corporation was subject to the jurisdiction of the North Carolina courts. The action was brought by the lender against the guarantor after the borrower failed to pay the note. The court concluded that the lending of money to a North Carolina resident involved the performance of services in North Carolina:

"We are of the opinion that clearly the lending of money to be repaid by the borrower is the rendering of a service by the lender to that borrower. It clearly follows therefrom that defendant's promise to pay the loan made by plaintiff to defendant's corporation is the promise to pay for a service rendered in this state,...."
First Citizens at Page 647.

The court also held that the due process requirements were not violated because:

"[A] single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base in personam jurisdiction...." First Citizens at p. 646.

While jurisdiction was actually based upon G.S. §1-75.4(5)(b) in the First Citizens case (the defendant was an individual), the court relied upon a number of precedents in which G.S. §55-145 was construed. Furthermore, the language of G.S. §55-145(a)(1) is essentially the same as that of G.S. §1-75.4(5)(b).

See also Koppers Company, Inc. v Kaiser Aluminum & Chemical Corporation, 9 N.C. App. 118, 175 S.E. 2d 761 (1970), holding that the agreement between an Alabama bank and a Delaware corporation by which the bank was to pay the creditors of a construction company in North Carolina was a contract to be performed in this state by the bank. The construction company was a Georgia partnership which had constructed railroad siding at a plant in North Carolina. The North Carolina creditors were the subcontractors for that project.

The leading North Carolina Supreme Court case on the due process requirement is Byham v. The National Cibo House

Corporation, 265 N.C. 50, 143 S.E. 2d 225 (1965). In that case, the North Carolina Supreme Court held that G.S. §55-145(a)(1) applied to give the courts jurisdiction over a foreign corporation where the contract in question was an agreement by the North Carolina plaintiff to become a franchisee of the defendant. Although the contract was made in Tennessee (the home office of the defendant) because it was executed last by the defendant in that state, the contract was to be performed in part in North Carolina. The defendant's franchise was for North Carolina and many of the activities of the plaintiff were to be in this state in operating the franchise. Many of the defendant's activities under the contract were to take place in Tennessee. In reaching its conclusion, the court cited a number of factors, including:

"Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state...

* * * * *

It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state.

It is essential to determine the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against foreign

corporations...courts are recognizing, for the most part, that the statutes reflect on the part of their legislatures a conscious purpose to assert jurisdiction over non-resident defendants to the extent permitted by the due process requirement." Byham at page 57.

Finally, as stated in a number of other cases set forth above, only a partial performance in this state is necessary for the "performance in this state" standard to apply. See, for example, McCoy Lumber Industries, Inc. v. Niedermeyer-Martin Co., 356 F. Supp. 1221 (M.D.N.C. 1973), stating that even though only a relatively small percentage of the contract was to be performed in North Carolina, the amount of work performed there involved approximately \$35,000, which the court found to be a substantial amount of performance in this state, sufficient to find that the contract was to be performed in this state within the meaning of G.S. §1-75.4 (5) (a) and (b), discussed infra.

As noted earlier, this action arises out of two contracts, the permanent commitment and the Letter Agreement, of which Chemical is the named beneficiary. Based on the standards set forth in the cases discussed above, and especially in the Equity case, it is clear that both of the contracts in this case were to be performed substantially in North Carolina.

In particular, Chemical has listed the numerous requirements to be performed by each of the parties in North Carolina at pages 10 through 19 of this Brief. In addition, substantially all of the witnesses concerning the performance of the contracts reside in this state.

In contending that G.S. §55-145(a)(1) cannot be constitutionally applied in this case, Home Federal argues that the Letter Agreement does not constitute a contract, because it does not require Home Federal to take any action. (Home Federal refers to the Letter Agreement as an "estoppel certificate"). On the contrary, the Letter Agreement binds Home Federal to accept the \$90,000 of commitment fees from Chemical and to purchase the note and accept an assignment of the deed of trust from Chemical upon completion of the hotel, certified by Chemical's engineer, and upon issuance of certain certificates by local authorities.

Home Federal also contends that the permanent commitment and Letter Agreement were not to be performed in North Carolina, because the purchase of the note might not take place there. Wohl was invited to North Carolina to close the loan there. Chemical eventually went to Florida to attempt to close the loan. The place of closing was not specifically stated in the documents. However, on closing, Home Federal would acquire an interest in the hotel in Asheville, and the personal property associated with it, which would involve the transfer of an

interest in property and the filing of documents in this state.

Furthermore, the place of closing is especially not significant in light of the substantial activities required of Chemical, Landmark and others in North Carolina as well as the activities of Home Federal in this state in connection with this transaction. In fact the North Carolina court in the Equity case did not cite the place of the attempted closing with the permanent lender (Connecticut) as a factor in determining jurisdiction in that case.

Because the constitutional application of G.S. §55-145(a)(1) was so clear, the Court of Appeals did not discuss the other grounds for jurisdiction found by the trial court. However, that the assertion of jurisdiction was proper is equally clear under those statutes, as discussed infra.

B. Home Federal is also subject to the jurisdiction of the courts of this state under the terms of G.S. §1-75.4(5)(a) and (b), in that this action arises out of a promise to perform services and out of services actually performed in this state and to pay for services performed within this state. G.S. §1-75.4(5)(a) states that the courts of this state have jurisdiction over any defendant in an action which:

"Arises out of a promise,

made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff...."

As discussed, supra, the North Carolina Court of Appeals in First Citizens Bank & Trust Company v. McDaniel, held that G.S. §1-75.4(5)(a) is constitutionally applicable to permit jurisdiction over a foreign guarantor of a note, since the lending of money to a North Carolina borrower is the rendering of a service in this state by the lender. Consequently, the agreement by the guarantor was a promise to pay for services rendered in this state, within the meaning of G.S. §1-75.4(5)(a). First Citizens at p. 647.

In addition, the United States District Court in McCoy, supra, held that G.S. §1-75.4(5)(a) is constitutionally applied in a situation where only a portion of the contract is to be performed in North Carolina.

Furthermore, the North Carolina Court of Appeals in First Citizens Bank & Trust Company v. McDaniel, supra, referred to cases decided under G.S. 55-145(a)(1) in support of its decision concerning G.S. §1-75.4(5)(a), presumably because of the similarity in

language of those statutes. Consequently, it would seem that the cases decided under G.S. §55-145(a)(1) discussed, supra, would apply in determining the meaning of G.S. §1-75.4(5)(a).

In the instant case, it is clear that Home Federal promised to pay the construction lender for having funded the construction of the hotel. That promise is expressly set forth in the Letter Agreement and is implied from the permanent commitment letter. The Letter Agreement states specifically that Home Federal will purchase the note and deed of trust from Chemical at the time of the completion of construction.

Chemical clearly performed services in this state in the form of making substantial advances to Landmark and, on occasion, directly to contractors, for the construction of the hotel called for by the permanent commitment and the Letter Agreement. In addition, Chemical also had its engineer, Merritt & Harris, inspect the project and render inspection reports. Finally, Chemical prepared the proper note and deed of trust and made the proper filings in North Carolina in order to give Home Federal the lien it required in its permanent commitment and the Letter Agreement. The hotel was constructed in North Carolina by use of the construction loan proceeds supplied by Chemical. It is therefore clear that Home Federal agreed to pay for services to be performed in this

state by the Appellee and is consequently subject to the jurisdiction of this court.

G.S. §1-75.4(5)(b) states that the North Carolina courts will have jurisdiction over any defendant in any action which:

"Arises out of services actually performed...for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant..."

As discussed above, Chemical did perform substantial services in this state pursuant to the permanent commitment and Letter Agreement. That performance was clearly authorized by Home Federal since it is the performance specifically called for by the permanent commitment and Letter Agreement.

C. Home Federal is also subject to jurisdiction under the requirements of G.S. §1-75.4(6)(a), since the action arises out of a promise to convey and acquire an interest in real property situated in North Carolina. G.S. §1-75.4(6)(a) states that the North Carolina courts have jurisdiction over any defendant in an action which arises out of:

"A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to

create in either party an interest in, or protect, acquire, dispose of, use rent, own, control or possess by either party real property situated in this state"

In Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E. 2d 676 (1974), the North Carolina Supreme Court held that a foreign defendant is subject to the jurisdiction of the courts of this state where that defendant made a promise to purchase certain real property located in North Carolina. The plaintiff had brought an action to recover for the breach of that agreement by the defendant. The court held that G.S. §1-75.4 (6)(a) quite clearly applied to that factual situation, since the defendant had agreed to acquire an interest in real property in this state and the plaintiff had agreed to dispose of that interest to the defendant. The court also held that the due process requirements of the United States Constitution were not violated, because the defendant had purposefully invoked the benefit of protection of the laws of this state by entering into a contract to purchase land here and by forming a corporation in this state to receive title to the property.

In the instant case, Home Federal agreed to acquire an interest in the hotel by becoming the holder of a deed of trust transferring title to the hotel and Chemical agreed to assign its interest in the hotel to Home Federal under the letter agreement.

In addition to the other actions described above, Home Federal has invoked the benefit of the laws of North Carolina by requiring Chemical to perfect a first lien against the real property in question. That lien was obtained by proper filings with the Clerk of Court of Buncombe County.

D. Home Federal is subject to the jurisdiction of the North Carolina courts pursuant to G.S. §55-145(a)(2) in that this action arose out of business solicited by Home Federal in North Carolina, at a time when it was soliciting other business. G.S. §55-145(a)(2) states that a foreign corporation is subject to suit in this state on any cause of action arising:

"Out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state
...."

This action arises out of business solicited by Home Federal in this state. While it appears that the initial contact

with Home Federal for the Landmark loan was made by Atlantic or a New York broker, neither of those brokers represented Landmark. In fact, Thomas Wharton testified at his deposition that Atlantic represented Home Federal. Acting on behalf of Home Federal, Atlantic set up the initial meeting with Crawford to reach agreement on the terms of a permanent commitment. Home Federal actually made the offer to Landmark for the permanent commitment by sending the commitment letter to Atlantic for Crawford's approval. That offer was accepted by Crawford.

During this same period, Wohl had requested that Atlantic continue to be on the lookout for other loans for Home Federal in North Carolina and had encouraged Atlantic to find such loans. Pursuant to that request, Atlantic discussed numerous possible loans with Home Federal. Atlantic showed Wohl some apartments in Charlotte, North Carolina.

In fact, Home Federal, at about that same time, entered into a permanent commitment and permanent loan on an apartment project in Jacksonville, North Carolina. The owners of the property and the borrowers in that case were the Beachams. That transaction is discussed in detail in the deposition of Thomas Wohl, who admitted that the Landmark and Beacham loans were obtained pursuant to Home Federal's "nationwide lending program".

Based on the solicitation of the Landmark loan and the repeated solicitations during that same time by Atlantic on behalf of Home Federal, Home Federal is subject to the jurisdiction of the North Carolina courts under the terms of G.S. §55-145(a)(2).

E. Home Federal is also subject to the jurisdiction of the North Carolina courts based on the terms of GS §1-75.4(1)(d) and GS §55-144. GS §1-75.4(1)(d) states that the North Carolina courts will have jurisdiction over a defendant in any action:

"Whether the claim arises within or without this state in which a claim is asserted against a party who when service of process is made upon such party:

* * * * *

(d) is engaged in substantial activity within this state, whether such activity is wholly interstate, intrastate, or otherwise."

The meaning of "substantial activity" under this statute is as broad as the "minimum contacts" requirement of due process. See Dillon vs. Numismatic Funding Corporation, 291 N.C. 674, 231 S.E. 2d 629 (1977). Clearly the numerous activities of Home Federal described above, constitute substantial activity within this state.

GS §55-144 provides that North Carolina courts have jurisdiction over any corporation "transacting business" in North Carolina, regardless of whether it has a certificate of authority to do so. The North Carolina Supreme Court has held that a corporation is deemed to be transacting business under North Carolina law for jurisdictional purposes, if the corporation is "engaging in, carrying on, or exercising, in this state, some of the things, or some of the functions, for which the corporation was created." Ruark vs. Virginia Trust Co., 206 N.C. 564, 174 S.E. 441 (1934). And see State Highway And Public Works Commission of North Carolina vs. Diamond Steamship Transportation Corporation, 225 N.C. 198, 34 S.E. 2d 73 (1945), to the same effect.

F. Home Federal's "minimum contacts" cases are not applicable to this action.

Home Federal discusses at great length in its jurisdictional statement a number of cases concerning the "minimum contacts" requirement of the due process clause. Chemical has discussed the due process requirement in the above sections in the context of the various long-arm statutes. It is clear, based on the cases cited by Chemical, that Home Federal has ample contacts with North Carolina to satisfy the due process requirement. For example, as discussed in detail, supra, this action is based upon contracts made in this state, contracts to be performed in this state by all of the parties, and contracts

involving the transfer of an interest in land located in North Carolina from Chemical to Home Federal, which interest is represented by filings made in North Carolina by Chemical pursuant to Home Federal's requirements in the Letter Agreement.

None of the cases cited by Home Federal contains all of the substantial contacts present in the instant case. Home Federal's brief fails to relate the cases to the particular long-arm statutes in question, and thus discusses the minimum contacts issue in the abstract. Significantly, Home Federal cites for support only one North Carolina state court case. All of the other cases relied upon by Home Federal are federal court opinions.

Chemical will briefly highlight the reasons why each of the cases relied upon by Home Federal has no applicability to the instant case. A reading of all of the cases cited by Home Federal simply reinforces Chemical's contention that the question of whether assertion of jurisdiction is "fair" depends upon the facts in each case, and that such determination is primarily the role of the state courts.

Home Federal appears to base its primary reliance for support on Shaffer vs. Heitner, 433 U.S. 186, 97 S. Ct. 2569 (1977). That case has no relevance to the instant case. The plaintiff brought an action in Delaware against non-resident directors and officers of a Delaware

corporation, alleging breach of fiduciary duty to the Delaware corporation. Apparently, the corporation's principal place of business was not in Delaware, although it was incorporated there. Under a Delaware statute, the plaintiff sequestered certain Delaware property (stock and stock options in the corporation) belonging to the defendant. The Delaware courts found that Delaware had jurisdiction over the defendants, based solely upon the fact that the defendants had property in Delaware which had been sequestered pursuant to the Delaware statute. This court held that where jurisdiction is based solely upon the sequestration of property located in the state, which property does not relate to the underlying cause of action, the minimum contacts requirement has not been met.

The court emphasized that the basis for jurisdiction was defective because it was founded solely upon the sequestration statute, and did not relate to the activities of the defendants as officers and directors of the corporation. In fact, the court simply applied the standard test of whether assertion of jurisdiction offended "traditional notions of fair play and substantial justice", which is the same test applied by the North Carolina courts in the cases relied upon by Chemical.

The holding of this court in Shaffer, clearly has no relevance to the instant case, since it did not even involve a long arm statute similar to any of those relied upon by Chemical.

In Kulko vs. Superior Court of California, 436 U.S. 584, 98 S. Ct. 1690 (1978), this court held that the state courts of California could not assert jurisdiction over a resident of New York in an action by a divorced mother (residing in California) against the father (residing in New York). The purpose of the action was to obtain the modification of the terms of a separation agreement between the parties which had been incorporated in a divorce decree obtained in Haiti. No long-arm statutes similar to those asserted in the instant case were involved. The court held that the father did not have sufficient minimum contacts with the State of California, because the separation agreement was made in New York, the father had no connection with California (other than spending three days there almost twenty years before, at which time he married the plaintiff while on military leave), and there was no evidence that the defendant obtained any benefits whatsoever from any activities taking place in the State of California.

In Piracci vs. New York City Employees' Retirement System, 321 F. Supp. 1067 (D. Md. 1971), the district court held that it did not have jurisdiction over a New York pension fund for failure to fulfill a commitment to lend money to

a Maryland developer. The only long-arm statute relied upon by the plaintiff in that case provided for jurisdiction if the defendant was "transacting business" in Maryland. Although the court referred to the due process clause, the actual holding of the court was that the particular state statute required that the cause of action arise out of business actually transacted by the defendant in Maryland.

The court found that the defendant had not transacted business in Maryland in that case because there had been no solicitation in Maryland by the defendant, and the agreement sued upon by the plaintiff had been made in New York (in contrast to the instant case, in which the permanent commitment was solicited and negotiated in North Carolina, and the permanent commitment and letter agreement were made in North Carolina). Furthermore, the defendant in that case did not have the substantial additional contacts with the forum state that Home Federal has in the instant case. The court did not deal with a specific long-arm statute granting jurisdiction over a claim arising out of contracts to be performed in that state. In fact, the outcome may have been different if it had, since the court specifically found that the loan commitment had a substantial connection with Maryland. Since it found that the "transacting business" statute did not apply to the defendant in that case, the court stated that it was not deciding whether the defendant had a substantial

enough connection with the forum state to make the exercise of jurisdiction "reasonable".

In Golden Belt Manufacturing Company vs. Janler Plastic Mold Corporation, 281 F. Supp. 368 (M.D.N.C. 1967), the federal district court held that the defendant did not have sufficient minimum contacts with the State of North Carolina for jurisdictional purposes, where the purchase order in question was accepted by the defendant in Illinois, the goods were manufactured in Illinois, and the goods were delivered to the plaintiff in Illinois, when they were shipped f.o.b. Chicago. There was no evidence that the defendant had any other contacts with North Carolina in any manner, either in connection with the contract at issue or in connection with any other transaction.

In United Advertising Agency, Inc. vs. Robb, 391 F. Supp. 626 (N.D.N.C. 1975), an advertising agency was suing its client in North Carolina for alleged services in preparing certain advertisements for the client. The federal district court held that it could not assert jurisdiction over the defendant because there was no evidence of any contacts between the defendants and North Carolina, the advertisements in question were to take place only in Missouri and Kansas, the defendants derived no benefit and had no possibility of deriving any benefit from the laws of North Carolina, since North Carolina was not involved in the advertisements, the services of the plaintiffs could have been performed

anywhere, there was no evidence that the defendants were ever in the State of North Carolina, and there was no intent on the part of the defendants to advance their contacts with this state. The court stated that it would have been important to determine where the contract was made, or where the negotiations took place for the contract. However, there was no evidence on either of those points. In addition, the court found that, although some services were to be performed in North Carolina, those services were not "substantial", since they only involved fees of \$13,000.

In Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974), the plaintiffs, while residing in Florida, purchased mobile homes from the defendant. At the time of the sale, there was no connection with the State of North Carolina. The plaintiffs subsequently moved to North Carolina. The court held that it could not assert jurisdiction over the defendant seller in an action for fraud committed in connection with those sales, because the defendant seller was no longer the owner of the contracts, the contracts had been performed completely in Florida, the transaction had no connection with North Carolina at the time it was entered into, and the defendant made no attempt to benefit from the laws of North Carolina.

In discussing the law relating to jurisdiction, the court held that it could constitutionally assert jurisdiction if there had been any evidence that the

defendant had benefited from the laws of North Carolina or used the laws of North Carolina in any manner, or if the contract was to have been performed in North Carolina or had a substantial connection with this state. In fact, the court held that it did have jurisdiction over the defendant bank (which had purchased the sales contract from the defendant seller), because the bank had security agreements on items of personal property in North Carolina and, consequently, was invoking the benefit of the laws of North Carolina and had the ability to benefit from the laws of North Carolina in enforcing those agreements. (However, the venue was not proper as to the bank, because of the National Bank Act venue statute.)

In Munchak Corporation vs. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973), the federal district court found that there were not sufficient minimum contacts, where the plaintiff alleged that the defendant had interfered with the plaintiff's contractual relationship with William Cunningham, a basketball player. The defendant was a Pennsylvania corporation. The court found that the only contacts between the defendant and the State of North Carolina were that: the defendant had been involved in an action filed by the plaintiff against Cunningham in North Carolina, the defendant sent basketball scouts into the State of North Carolina (which had no relationship to the instant action), and the games of a basketball team owned by the defendant in Philadelphia

were televised in North Carolina pursuant to a contract between a national television network and the National Basketball Association. The court found that there were no other activities of the defendant in North Carolina, either relating to the specific tort in question, or otherwise. Clearly such contacts fall far short of the activities of Home Federal in the instant case.

In Andrews Associates vs. Sodibar Systems of D.C., Inc., 28 N.C. App. 663, 222 S.E. 2d 922 (1976), pet. for dis. rev. den., 289 N.C. 726, 224 S.E. 2d 676 (1976), the North Carolina Court of Appeals held that there were not sufficient minimum contacts, when the contract for the sale of goods by plaintiff to the defendant was made in Washington, D. C. at the time the plaintiff called upon the defendant there. There was no evidence that the defendant had ever entered North Carolina for any reason, or that there were any negotiations or dealings by the defendant in North Carolina, or even relating to North Carolina, other than the single shipment by common carrier by plaintiff from North Carolina to the defendant. The court distinguished Byham, supra, cited by Chemical in this action, on the ground that the defendant had reserved the right in that case to control various activities that occurred in North Carolina, such as establishing procedures, inspecting books and operations, and selecting the location of the franchise. The court stated that Chadbourn, supra, also relied upon by Chemical, did not apply because the action "does not involve real property in this state."

The instant case is obviously different from Andrews, since the contracts relied upon in the instant case were made in North Carolina, there were substantial negotiations through a North Carolina broker who was representing Home Federal, and substantial activities by both Chemical and the borrower took place in North Carolina in order to fulfill the requirements set by Home Federal. Home Federal visited North Carolina on several occasions in connection with this project and maintained control over numerous activities in North Carolina, requiring the obtention of liens, inspections by Chemical, approving appraisals, surveys, and even the plans and specifications for the hotel. Furthermore, this action clearly involves a breach of contract by Home Federal to purchase an interest in North Carolina real estate from Chemical.

Finally, Home Federal attempts to distinguish the Equity case, supra, primarily on the ground that the plaintiff in that case was a North Carolina partnership. On the contrary, the residence of the plaintiff in the Equity case had no bearing on the question of whether there was jurisdiction over the defendant. The Equity court did not cite that as a factor. (In fact, the requirement that the plaintiff must be a North Carolina resident in order to take advantage of GS §55-145 was specifically deleted by the North Carolina legislature in a 1973 amendment to that statute.)

Home Federal also attempts to distinguish Equity on the ground that the loan agreement in that case was a "tri-partite" loan agreement between the borrower, permanent lender, and construction lender. The two contracts in the instant case perform exactly the same function as a tri-partite agreement, creating direct contractual obligations among all the parties. Home Federal's only other attempt to distinguish the Equity case is to the effect that the Court of Appeals "erroneously" held that the contract in that case was to be performed in North Carolina. However, the clear facts in the Equity case, and in the instant case, show that the contracts required performance of their essential terms in North Carolina, including construction and financing of the hotel, making inspections and obtaining a first lien and deed of trust on the hotel.

II. GS §55-145(a)(1) is clear and consistent with the corporate law of North Carolina and thus is "fair" in its application to Home Federal.

Home Federal contends at paragraph II (page 39) of its jurisdictional statement that the application of GS §55-145 (a)(1) is "unfair" in that it is contradictory to GS §55-131(b)(6).

GS §55-131 is entitled "Right To Transact Business." Subparagraph (a) of that section requires a foreign corporation to procure a certificate of

authority from the Secretary of State of North Carolina before it "transacts business" in this state.

Subparagraph (b)(6) provides that a foreign corporation shall not be considered to be transacting business in this state, for the purpose of that chapter (Chapter 55) by reason of "making or investing in loans" through independent agencies within this state.

The obvious purpose of the statute is to exempt foreign corporations from the requirement of obtaining a certificate of authority to do business in North Carolina, if they are involved in certain activities in this state. The statute has no reference to the question of whether a foreign corporation might be subject to suit in this state. It is well established that the standards for being required to register to do business in a state are much more strenuous than the standards required for being subject to suit in that state.

Home Federal contends that GS §55-145(a)(1) is contradictory with GS §55-131(b)(6), if the court permits jurisdiction to be asserted over Home Federal in this case. On the contrary, GS §55-145(a)(1), as revealed by its title, clearly deals with "jurisdiction over foreign corporations not transacting business in this state." (Emphasis added)

More specifically, GS §55-145(a)(1) states that every foreign corporation shall be subject to suit in North

Carolina, whether or not such corporation is transacting or has transacted business in this state, in any cause of action arising out of a contract made in this state or to be performed in this state. There is no conflict between GS §55-145 and GS §55-131. GS §55-145 specifically applies to corporations which may not be transacting business in North Carolina. Consequently, GS §55-145 applies whether or not a corporation is deemed to be transacting business for purposes of GS §55-131.

Furthermore, the titles of the two sections makes it clear that they are enacted for entirely different purposes.

In any event, the North Carolina Court of Appeals in the Equity case, supra, has specifically concluded that an out-of-state permanent lender, under circumstances substantially identical to the instant case, is subject to the jurisdiction of this state under GS §55-145(a)(1), and that such assertion of jurisdiction does not offend the "traditional notions of fair play and substantial justice."

It should also be noted that, as discussed above, there are numerous other long-arm statutes in North Carolina which are not a part of Chapter 55, and which clearly subject the defendant to jurisdiction in this state.

CONCLUSIONS

For the reasons set forth in this motion and brief, Chemical respectfully requests that the appeal of Home Federal be dismissed, or, in the alternative, that the judgment of the North Carolina courts be affirmed.

Respectfully submitted this
2nd day of November, 1979.

Joseph W. Grier, Jr.
Sydnor Thompson
Fred T. Lowrance
Attorneys for Appellee
Chemical Realty Corporation

Of Counsel:

GRIER, PARKER, POE, THOMPSON,
BERNSTEIN, GAGE & PRESTON
1100 Cameron-Brown Building
Charlotte, N. C. 28204
Telephone: 704 372-6730

EXHIBIT A

STATE OF NORTH CAROLINA	)	IN THE GENERAL
COUNTY OF BUNCOMBE	)	COURT OF JUS-
CHEMICAL REALTY	)	TICE
CORPORATION,	)	SUPERIOR COURT
	)	DIVISION
Plaintiff,	)	76 Cvs 02491
v.	)	FINDINGS OF
HOME FEDERAL	)	FACT, CONCLU-
SAVINGS & LOAN	)	SIONS OF LAW,
ASSOCIATION,	)	AND ORDER
Defendant.)	

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding on August 26, 1977, at the Buncombe County Courthouse, Asheville, North Carolina, upon the motion of the defendant, dated January 18, 1977, to dismiss the complaint or to change the venue of this action, and upon the motion of the plaintiff, dated May 4, 1977, to amend its complaint and summons.

This action was commenced on December 20, 1976, by the plaintiff, Chemical Realty Corporation ("Chemical"), in the Superior Court of Buncombe County, North Carolina. On January 18, 1977, the defendant, Home Federal Savings & Loan Association of Hollywood ("Home Federal"), filed a motion to dismiss the complaint on the grounds, in general, that (1) the Court lacks jurisdiction over the subject matter

of this action; (2) the Court lacks jurisdiction over the person of the defendant; (3) no proper service of process has been obtained on defendant; and (4) the Court should transfer this action to the appropriate court of Broward County, Florida.

The president of Home Federal stated in his deposition taken in this action that Home Federal's only objection to the service of process was that the named defendant was Home Federal Savings & Loan Association, rather than Home Federal Savings & Loan Association of Hollywood, which is the correct name of the defendant.

On May 5, 1977, the plaintiff moved to amend its complaint and summons to change the name of the defendant from Home Federal Savings & Loan Association to Home Federal Savings & Loan Association of Hollywood.

Upon being advised subsequent to the hearing of August 26, 1977, that the court had decided to deny the defendant's motion to dismiss or for change of venue and to grant the plaintiff's motion to amend its complaint and summons, the defendant requested that the court make findings of fact and conclusions of law in support of its order.

Upon consideration of the pleadings, affidavits, depositions, and exhibits thereto, the court makes the following

FINDINGS OF FACT:

1. Plaintiff is a New York corporation, with its principal office in New York, New York, and is engaged in the business of making construction and other types of real estate loans;
2. That in the early spring of 1972, Asheville Development Associates, a North Carolina partnership composed of F. Earl Crawford, Jr. ("Crawford") and others, proposed to build a hotel in downtown Asheville, North Carolina;
3. That Crawford began looking for a permanent lender for the project. He was contacted by Atlantic Mortgage & Investment Company in Winston-Salem, North Carolina, a mortgage brokerage company, which agreed to help him find such a lender. In the very early spring of 1972, a New York brokerage company put Atlantic and Crawford in touch with Home Federal, a corporation, organized under the Acts of Congress, registered as a federal savings and loan association located in Hollywood, Florida;
4. That Home Federal has not applied for nor procured any certificate of authority to transact business in the State of North Carolina; Home Federal has not established nor maintained any registered office in the State of North Carolina, nor appointed any agent nor designated any person upon whom any process, notice or demand required or permitted by law to be served upon it in the State of North Carolina may be

served;

5. That some preliminary communications took place between Atlantic, Crawford, and Home Federal relating to the proposed hotel project. J. P. Lauffer, the president of Atlantic, then arranged a meeting in Asheville between Thomas Wohl, the president of Home Federal, Crawford, Lauffer, and perhaps others. At the meeting, Wohl inspected the proposed hotel site and then proceeded to negotiate the terms of the permanent loan with Crawford. All of the principal terms of the permanent loan were decided upon at the meeting in Asheville, e.g., the principal amount, the interest rate, the term, the commitment fees, the length of the commitment, and the security for the loan;

6. That when Wohl returned to Florida, he prepared the permanent commitment letter, dated April 14, 1972, and delivered it to Atlantic for forwarding to Crawford for approval and execution by him. A copy of that commitment letter is attached to the plaintiff's complaint in this action as Exhibit A;

7. That the original permanent commitment letter provided, inter alia, that an appraisal be obtained on the real estate which would indicate a value of not less than \$8,000,000; that the hotel be constructed in accordance with working plans and specifications approved by Home Federal; that Home

Federal receive a valid first lien on real estate and that title insurance be obtained with respect to that real estate; that the borrower pay a \$60,000 commitment fee to keep the commitment in effect for a period of one year and that thereafter the commitment could be extended for additional six-month periods upon the payment of \$30,000 for each six-month extension; that certain local governmental approvals of the project be obtained; and that a portion of the loan be personally guaranteed by Earl Crawford and the other members of the partnership and their spouses;

8. That Atlantic forwarded the commitment to Crawford in Asheville for his approval and execution. Crawford approved the offer of Home Federal in Asheville, executed a copy and delivered the executed copy of the commitment letter, together with the \$60,000 commitment fee, to Michael Burroughs of Atlantic in Asheville. Burroughs then mailed the acceptance and fee to Home Federal from Winston-Salem, North Carolina;

9. That the original permanent commitment was modified on May 24, 1972, by the letter attached to the complaint as Exhibit B1;

10. That in the summer of 1972, Home Federal objected to the proposed management contract of the proposed management company, Hyatt House Hotel Corporation. Consequently, Crawford began

looking for a substitute management company. In October 1972, Wohl met with Crawford, Atlantic, and certain principals of Motor Inn Management Company, to discuss the possibility of Motor Inn Management's being engaged as the management company for the proposed hotel. That meeting took place in Charlotte. Subsequent to that meeting, on November 13, 1972, Home Federal accepted Motor Inn Management Company as the management company for the hotel;

11. That in late November 1972, Chemical was approached by a New York brokerage firm, Cooper-Horowitz, and asked to become the construction lender for the project. Chemical met with Crawford, Michael Burroughs of Atlantic, and a representative of Cooper-Horowitz. Chemical was informed that Home Federal had made a "take-out" commitment and was provided with a copy of it;

12. That relying upon the permanent commitment from Home Federal, Chemical issued a construction loan commitment on December 18, 1972. Chemical then undertook to negotiate an agreement with Home Federal in order to make certain of the circumstances under which Chemical would be paid off by Home Federal. Those negotiations were handled through Atlantic, primarily by Thomas Wharton, who was representing Home Federal in the negotiations. Home Federal was informed by Atlantic that Chemical required that the terms of the

take-out be finalized before the construction loan was closed;

13. That on or about the first of April, 1973, primarily through telephone conversations which each had with Wharton, Chemical and Home Federal agreed upon substantially all of the terms of the take-out. The terms of that agreement were reduced to writing in a letter prepared by Wharton in his office in Winston-Salem. The letter was delivered personally by Wharton to Home Federal in Hollywood, Florida, was executed by Home Federal and handed over to Wharton, and was then delivered personally by Wharton to Chemical in New York,. That is defendant's Exhibit 27 (the "Letter Agreement");

14. That under the terms of the Letter Agreement, Home Federal agreed, inter alia, that construction of the hotel in substantial compliance with the plans and specifications as certified by Merritt & Harris, Inc., the engineer retained by Chemical, would satisfy the construction conditions of the permanent commitment; that Home Federal would accept from Chemical a \$90,000 commitment fee to extend the permanent commitment until October 14, 1974; that Home Federal had approved the first mortgage real estate note and deed of trust attached to the Letter Agreement; that Home Federal had reviewed the construction note and deed of trust; and that Home Federal would purchase the first real estate note from Chemical without recourse

and accept an assignment of the deed of trust on the hotel, provided the loan was not in default under the terms of the permanent commitment and the permanent lender's loan documents;

15. That just prior to the signing of the Letter Agreement, Home Federal acknowledged to Earl Crawford that the permanent loan would be made to Landmark Hotel, Inc., a North Carolina corporation;

16. That the Letter Agreement lists various actions taken to that date by Landmark under the permanent commitment, including, inter alia, obtaining the required appraisal, surveys, and plans and specifications, which actions Home Federal approved in the Letter Agreement;

17. That Chemical then closed the construction loan on April 13, 1973. Subsequently, Chemical forwarded to Home Federal a total of \$90,000 in commitment fees in order to extend the permanent commitment through October 14, 1974. Of that fee, \$30,000 was forwarded directly to Home Federal's depository bank in Hollywood, and \$60,000 was delivered to Atlantic which, in turn, forwarded the fee to Home Federal;

18. That Chemical recorded the deed of trust with the Register of Deeds of Buncombe County and recorded the financing statements, reflecting a security interest in the personal

property in the hotel, with the Register of Deeds of Buncombe County and with the Secretary of State of North Carolina;

19. That Landmark began construction of the hotel shortly after the construction loan closing. Chemical made monthly advancements to Landmark to pay for the construction of the hotel in a total amount of approximately \$4,500,000. Some of the monthly checks were payable jointly to Landmark and to the various contractors involved in the project;

20. That during the course of construction, Chemical's engineer, Merritt and Harris, inspected the construction on a monthly basis and certified the percentage of completion;

21. That Home Federal employed a North Carolina attorney to certify that it would have a first lien on the hotel upon purchase of the note and deed of trust from Chemical;

22. That in October, 1973, Home Federal entered into a servicing agreement with Atlantic, pursuant to which Atlantic was to service this loan and other loans for Home Federal after the permanent loan had closed. Payments on any Home Federal loan were to be made by the borrower to Atlantic in North Carolina, and then forwarded to Home Federal by Atlantic after the servicing fee had been deducted. The

Landmark permanent loan note, attached to the Letter Agreement, required Landmark to make its payments through Atlantic in Winston-Salem.

23. That during the course of construction, Atlantic communicated with Home Federal on a number of occasions about various items relating to the Landmark project. In June, 1974, Thomas Wohl visited the construction site and inspected the hotel. Thereafter various conversations and correspondence took place between Atlantic, Chemical, and Landmark concerning the hotel and the permanent commitment;

24. That the hotel opened for business in July, 1974, although construction was still being completed on some floors of the hotel;

25. That in late September, 1974, Crawford informed Atlantic and Home Federal that the terms of the permanent commitment had been or were being fulfilled and that Landmark and Chemical were ready to close the permanent loan. Crawford requested that the closing took place in Asheville. Crawford received no response to that request;

26. That a Certificate of Occupancy was obtained from the appropriate Asheville authorities and Chemical's engineer, Merritt & Harris, Inc., inspected the hotel and certified that it was completed in substantial

compliance with the plans and specifications;

27. That the hotel shut down operations on October 9, 1974;

28. That Chemical then informed Home Federal that it would close the permanent loan with Home Federal at Home Federal's office. Chemical's representative met with Tom Wohl and his attorney in Hollywood on October 14, 1974, taking with them, among other things, the assignment of the deed of trust on the hotel and the assignment of the financing statements. At that time, Home Federal refused to close the permanent loan, stating that the hotel was closed;

29. That Home Federal requested that Atlantic be on the lookout for other loans in North Carolina for Home Federal and Atlantic has made numerous proposals to Home Federal for loans in North Carolina. Through the offices of Atlantic, Home Federal entered into a permanent commitment with the Beachams in Jacksonville, North Carolina, in 1973, and subsequently made a \$2,500,000 loan to the Beachams, secured by a deed of trust on the Beachams' apartment project in Jacksonville, North Carolina. The deed of trust was filed in the Register of Deeds of Onslow County. That loan is currently in effect and is being serviced by Atlantic;

30. That on December 20, 1976, Chemical commenced this action against Home Federal based on allegations that Chemical has been damaged by the wrongful refusal of Home Federal to accept the assignment of the deed of trust and financing statements;

31. That five depositions have already been taken in this action. Based on those depositions, it appears that a number of witnesses who reside in North Carolina may be material witnesses at the trial of this action;

32. That Home Federal regularly does not use the phrase "of Hollywood" on its stationery;

33. That Home Federal received the complaint and summons in this action and knew that the summons and complaint were meant for it, despite the fact that the phrase "of Hollywood" did not appear as a part of its name in the complaint and summons;

34. That Home Federal has not been prejudiced by the omission of the phrase "of Hollywood" on the complaint and summons.

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKE THE FOLLOWING

CONCLUSIONS OF LAW:

1. That the permanent commitment

between Landmark (or its predecessor) and Home Federal is a contract;

2. That the offer of a permanent commitment was accepted in North Carolina, and the contract was made in North Carolina;

3. That Chemical is a third party beneficiary of the permanent commitment;

4. That the permanent commitment was to be performed substantially in North Carolina, in part by Landmark and in part by Chemical;

5. That the Letter Agreement (Defendant's Exhibit 27) is a contract between Chemical and Home Federal which was to be performed substantially in North Carolina by Chemical;

6. That Chemical performed a substantial number of services in North Carolina pursuant to the Letter Agreement and permanent commitment;

7. That this Court has subject matter jurisdiction over this action;

8. That this action arises out of a contract made or to be performed in this state within the meaning of G.S. Sec. 55-145 (a)(1);

9. That this action arises out of a promise made to Chemical and to Landmark for Chemical's benefit, by Home Federal to pay for services to be performed in this state by Chemical

within the meaning of G.S. Sec. 75.4(5) (a);

10. That this action arises out of services actually performed by Chemical for Home Federal within this state within the meaning of G.S. Sec. 1-75.4 (5)(b), and such performance was authorized by Home Federal;

11. That this action arises out of a promise made to Chemical and to Landmark for Chemical's benefit by Home Federal to have Chemical create an interest in real property and for Home Federal to acquire an interest in real property situated in this state within the meaning of G.S. Sec. 1-75.4 (6)(a);

12. That Home Federal was engaged in substantial activity within this state within the meaning of G.S. Sec. 1-75.4(1)(d) at the time process was served on it in this action;

13. That Home Federal was transacting business in North Carolina within the meaning of G.S. Sec. 55-144 at the time this cause of action arose and at the time process was served on it;

14. That this action arose out of business solicited by Home Federal within this state and Home Federal has repeatedly so solicited business here within the meaning of G.S. Sec. 55-145(a)(2);

15. That this Court has jurisdiction over the defendant in this action;

16. That service of process on the defendant was proper;

17. That this Court has no power to transfer this action to Broward County, Florida, and the venue of this action is properly laid in Buncombe County, North Carolina.

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED AND DECREED that the motion of the defendant to dismiss for lack of jurisdiction or for change of venue is DENIED, and the motion of plaintiff to amend its complaint and summons is GRANTED.

This 1st day of October, 1977.

s/ HARRY C. MARTIN
Senior Resident Superior Court
Judge
28th Judicial District

Home Federal Savings and Loan
Association of Hollywood EXCEPTS and
OBJECTS to the signing and entry of
the above Order.

s/ HARRY C. MARTIN
Senior Resident Superior Court
Judge
28th Judicial District

Home Federal Savings and Loan Association of Hollywood's oral notice of appeal, given by its attorney of record, John E. Raper, Jr., on the date hereof, is hereby noted. Further notice is waived. The defendant is allowed the time provided by statute in which to serve the case on appeal on the plaintiff, and the plaintiff is allowed thereafter the time provided by statute in which to serve a counter-case upon the defendant. Appeal bond is set at \$200 for the defendant.

This 1st day of October, 1977.

s/ HARRY C. MARTIN
Senior Resident Superior Court
Judge
28th Judicial District

EXHIBIT B

No. 170 PC

TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
Spring Term 1979

* * * * *

CHEMICAL REALTY CORPORATION)

v.

HOME FEDERAL SAVINGS AND
LOAN ASSOCIATION OF
HOLLYWOOD

) JUDGMENT
) DISMISSING
) APPEAL ON
) MOTION OF
) PLAINTIFF
) AND DENYING
) PETITION FOR
) DISCRETION-
) ARY REVIEW
) (7828SC420)
)

* * * * *

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G.S. 7A-30, upon the plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 28th day of June, 1979, that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the Defendant do pay the sum of NINE AND NO/100 DOLLARS (\$9.00) and execution issue therefor.

s/ Brock, J.

For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 5th day of July, 1979.

s/

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
McCoy, Weaver, Wiggins, Cleveland
& Raper, Attorneys at Law
Grier, Parker, Poe, Thompson,
Bernstein, Gage & Preston,
Attorneys at Law

EXHIBIT C

HOMES FEDERAL SAVINGS AND LOAN
1720 Harrison Street
P. O. Box 2168
Hollywood, Florida 33022

Chemical Realty Corporation
277 Park Avenue
New York, New York 10017

Our \$6,000,000 mortgage loan commitment to Landmark Hotel, Inc. (the Borrower) dated April 14, 1972, as modified by our letters dated May 24 and November 13, 1972 and March 28, 1973 (collectively the Commitment), covering the Premises at Woodfin and College Streets, Asheville, North Carolina.

Gentlemen:

This is to confirm that the Commitment and amendments, copies of which are attached hereto, is in full force and effect as of the date hereof, that there have been no modifications thereof and that no modifications shall be made without your consent and pursuant to such commitment. This is to confirm that:

1. We have received, in full satisfaction of the terms of paragraph numbered 1 of the Commitment, an MAI appraisal indicating a value in the Premises, upon completion of the improvements of at least \$8,000,000;

2. We have reviewed the Chicago Title Insurance Company commitment for Title Insurance No. 73-U-00006 attached hereto as marked up with deletions crossed

through and additions noted thereon; Chicago Title Insurance Company is acceptable to us as the title insurer and policy to be issued to us pursuant to paragraph 5 of our commitment with exceptions for:

a. Easements and rights of way for public utilities and adjoining public roads and ways, their construction and maintenance,

b. Covenants with respect to use of realty for commercial purposes, off-street parking and loading, and landscaping,

c. City and county taxes and assessments, and

d. Restrictions with respect to signs, discrimination in either sales, leases, or rentals and noxious or offensive activities,

will be satisfactory and acceptable by us.

3. We have approved the plans and specifications listed on the sheet attached hereto and agree that construction of the improvements in substantial compliance therewith, as certified by your supervising engineer, Merritt & Harris, Inc., shall satisfy the construction conditions of the Commitment, and we agree that the substantial furnishing and equipping of the improvements in accordance with the schedule attached hereto will meet the assumptions made in the feasibility report referred to

in the Commitment and will satisfy the requirements of the second sentence of paragraph numbered 2 of the Commitment;

4. We have found acceptable and approved the Management Contract dated December 26, 1972 between Asheville Development Associates and Motor Inn Management, Inc. as assigned to the Borrower satisfying the terms of paragraph numbered 4 of the Commitment.

5. We have received the \$60,000 commitment fee referred to in paragraph numbered 8 of the Commitment and agree that we will accept from you the additional \$90,000 commitment fee at the closing of the construction loan whereupon the Commitment will be automatically extended to October 14, 1974;

6. The issuance of (a) the Certificate of Completion referred to in Section 307 of the Contract for Sale of Land For Private Redevelopment by and between Overland Investments, Ltd. and Housing Authority of The City of Asheville and (b) a Certificate of Occupancy, will satisfy the conditions of paragraph numbered 9(a) of the Commitment;

7. The provisions for automatic termination of the Commitment contained in paragraph 9(c) of the Commitment are waived until such time as we have received an assignment of the Deed of Trust, said provisions being intended to be incorporated in your loan documents;

8. The condition of our commitment

contained in paragraph numbered 1 of the May 24, 1972 letter modification is hereby waived;

9. The survey of the Premises attached hereto is satisfactory to us and survey changes made in connection with the completion of the improvements, including easements for utilities designed to service the Premises shall not constitute objectionable matters of survey;

10. We have approved, in all respects the First Mortgage Real Estate Note and Deed of Trust, copies of which are attached hereto, and agree that at the appropriate time, as provided in the Commitment, we will purchase said First Real Estate Note from you, without recourse, and accept the assignment of said Deed of Trust provided however that the loan is not in default under the terms of our Commitment or our loan documents. We have also approved the form of the assignment of the Deed of Trust to be made by you to us, a copy of which is attached hereto.

11. We have reviewed the Construction Note and Construction Deed of Trust attached hereto including the language incorporating therein the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above. We understand that the Guaranty and Endorsement on the Construction Note will be executed at the closing of your construction loan with Landmark Hotel, Inc. and will survive an assignment of your note to us. We understand that the terms and

provisions of the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above will automatically become operative upon an assignment of the Deed of Trust and Note to us from you.

12. F. Earl Crawford, Jr. and Vestal C. Taylor are the individuals referred to in the Commitment as Earl Crawford and Festal Taylor, respectively.

13. We agree that if the First Mortgage Real Estate Note, referred to us in paragraph 11 above, to be purchased by us, contains the following executed endorsement, to wit:

"Endorsement and Guarantors." The undersigned agree to be jointly and severally liable on all sums of principal and interest that remain unpaid above \$4,000,000. It being the intent of the parties that once the loan has been reduced below \$4,000,000, this guaranty is to be of no force and effect.

James T. Crawford (L.S.)

Barbara Crawford (L.S.)

Vestal Taylor (L.S.)

F. Earl Crawford, Jr. (L.S.)

Overland Investment, Ltd.

By: _____

ATTEST: _____

the requirements of paragraph numbered 10 of the Commitment will be fully satisfied.

14. The Nondivestature Agreement, a copy of which is attached hereto, when executed by F. Earl Crawford, Jr. will satisfy the condition of the Commitment contained in paragraph numbered 2 of the May 24, 1972 letter referred to above.

Very truly yours,

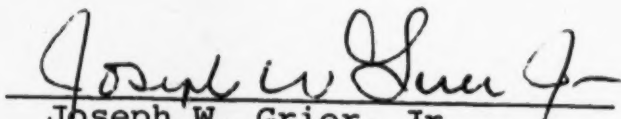
HOME FEDERAL SAVINGS AND
LOAN OF HOLLYWOOD

By: s/ Thomas M. Wohl

CERTIFICATE

In accordance with Rules 16 and 33(1) of the Rules of Practice of the United States Supreme Court, I hereby certify that I have on this 2nd day of November, 1979, filed the required 40 copies of Appellee's motion to dismiss Appellant's appeal and, in the alternative motion to affirm the judgment of the North Carolina courts, and Brief in Support of such Motion, in the office of the Clerk of the United States Supreme Court and have mailed the required three copies of the same to John E. Raper, Jr. and Richard M. Wiggins, McCoy, Weaver, Wiggins, Cleveland & Raper, 222 Maiden Lane, Fayetteville, North Carolina 28302 by depositing same in a United States mail box with first class postage prepaid.

Given under my hand this 2nd day of November, 1979.



Joseph W. Grier, Jr.
GRIER, PARKER, POE, THOMPSON,
BERNSTEIN, GAGE & PRESTON
1100 Cameron-Brown Building
Charlotte, N. C. 28204
Telephone: 704 372-6730